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18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 SAN JOSE DIVISION

21 In re CISCO SYSTEMS, INC. SECURITIES)	Master File No. C-01-20418-JW(PVT)
LITIGATION)	
22 _____)	<u>CLASS ACTION</u>
23 This Document Relates To:)	
24 ALL ACTIONS.)	NOTICE OF MOTION AND MOTION FOR
25 _____)	ORDER ADOPTING PLAINTIFFS'
	PROPOSED SCHEDULE FOR THE
	DISCLOSURE OF EXPERT WITNESS
	REPORTS

26 DATE: May 9, 2005
27 TIME: 9:00 a.m.
CTRM: 8 – Honorable James Ware

1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that on May 9, 2005, at 9:00 a.m., or as soon thereafter as counsel
3 may be heard, in the courtroom of the Honorable James Ware, 280 South First Street, San Jose,
4 California 95113, plaintiffs will and hereby do move this Court for an order adopting plaintiffs'
5 proposed schedule for the disclosure of expert witness reports.¹

6 This motion is made pursuant to Rule 26(a)(2)(C) of the Federal Rules of Civil Procedure on
7 the grounds that the parties have stipulated to a revised pretrial schedule but have been unable to
8 agree upon a schedule for the exchange of expert witness reports.

9 This motion is based upon this Notice of Motion and Motion, the Memorandum of Law,
10 upon the pleadings and records on file in this action, and on such argument or evidence as may be
11 presented to the Court in connection with the hearing on this motion.

12 **MEMORANDUM OF LAW**

13 This Court entered an Amended Scheduling Order on July 2, 2003, setting forth a pretrial
14 schedule in the above-entitled action. Recently, the parties submitted a stipulated order seeking to
15 amend this schedule in certain respects, but the parties were unable to agree on a schedule for
16 disclosing expert witness reports. Defendants have insisted that they be allowed to disclose their
17 initial expert witness reports after plaintiffs, while plaintiffs have maintained that simultaneous
18 disclosure is the more appropriate course and submit the instant brief in support of that position.

19 Plaintiffs contend that the parties in this action should exchange their expert reports
20 simultaneously because it is the fairest procedure and it is consistent with both Federal Rule Civil
21 Procedure 26(a)(2)(C) as well as this Court's prior Order. Rule 26(a)(2)(C) provides that all initial
22 expert reports shall be disclosed at least 90 days before trial and that rebuttal reports shall be
23 disclosed within 30 days of the initial reports. This scheme provides notice of any expert opinions to
24 be offered at trial and the opportunity for the responding parties to prepare and provide notice of any
25 expert opinions to be offered on rebuttal. Rule 26(a)(2)(C) empowers this Court to alter this

26
27 ¹ All parties have agreed to file simultaneous briefs regarding this motion, waiving opposition
28 and reply briefs.

1 schedule as it sees fit, and pursuant to that authority this Court required in its July 2, 2003 Amended
2 Scheduling Order that the parties simultaneously exchange their initial reports by July 29, 2005 and
3 simultaneously exchange their rebuttal reports by August 8, 2005. Plaintiffs urge the Court to adopt
4 a schedule for the simultaneous exchange of expert reports consistent with its prior Order because
5 the staggered schedule proposed by defendants would unfairly prejudice plaintiffs.

6 Whatever pretext they may present to the Court, defendants wish to disclose their initial
7 expert reports after plaintiffs in order to have two bites at the apple. After reading plaintiffs' initial
8 reports, defendants would be able to respond to those reports in both their initial reports and rebuttal
9 reports. Perhaps more prejudicial, defendants would be able to use their rebuttal reports to respond
10 not only to plaintiffs' initial reports, but to plaintiffs' rebuttal reports as well. This is not the process
11 contemplated by Federal Rule of Civil Procedure 26(a)(2)(C) and should not be adopted. Under that
12 rule, all parties are on equal footing – all may submit initial reports and all have the opportunity to
13 respond to the initial reports of their adversaries once, in rebuttal reports. There is no justification
14 for abandoning this even-handed approach here. Although plaintiffs have the burden of proof as to
15 their claims, defendants have the burden of proof as to their affirmative defenses. As such, it makes
16 no more sense for plaintiffs to disclose their initial reports first than it would for defendants to do so.
17 Furthermore, plaintiffs always have the burden of proof, yet Rule 26(a)(2)(C) nevertheless provides
18 for a simultaneous exchange of reports. In order to avoid the prejudice to plaintiffs that would result
19 from the “staggered” schedule proposed by defendants, plaintiffs respectfully request that the Court

once again adopt a schedule calling for the simultaneous exchange of expert reports, as it did in its July 2, 2003 Amended Scheduling Order.

DATED: April 4, 2005

Respectfully submitted,

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DECLARATION OF SERVICE

I hereby certify that on April 4, 2005, I electronically filed the foregoing NOTICE OF MOTION AND MOTION FOR ORDER ADOPTING PLAINTIFFS' PROPOSED SCHEDULE FOR THE DISCLOSURE OF EXPERT WITNESS REPORTS with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys denoted on the attached Service List. I hereby certify that I have caused this document to be mailed by the United States Postal Service and/or faxed to the non-CM/ECF participants listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of April, 2005, at San Diego, California.

s/Matthew P. Montgomery
MATTHEW P. MONTGOMERY

CISCO (FEDERAL-LEAD)

Service List - 4/4/2005 (201-110-1)

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